Supreme Court, U.S.
FILED
JUN 28 2001

No. 01-39

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2000

ADAM CARTER
Petitioner,

vs.

ANA M. RAMIREZ-PALMER; WARDEN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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51 pp

QUESTIONS PRESENTED

Did the United States Court of Appeals for the Ninth Circuit err in denying petitioner's Request for a Certificate of Appealability on grounds that petitioner failed to make the requisite substantial showing of the denial of constitutional rights as to each claim presented?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The petitioner ADAM CARTER respectfully prays that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Ninth Circuit, entered on March 30, 2001.

OPINIONS BELOW

The Order of the Court of Appeals for the Ninth Circuit, Filed March 30, 2001, denying petitioner's request for a Certificate of Appealability appears in full as Appendix A to this petition.

The Judgement and Order of the United States District Court for the Central District of California adopting the Report and Recommendation of the Magistrate Judge appears as Appendix B to this petition. The Report and Recommendation of the Magistrate Judge is included and appears in full as Appendix C to this petition.

JURISDICTION

The United States Supreme Court has jurisdiction under Title 28 U.S.C. § 1254(1) to review denials of applications for Certificates of Appealability by a circuit judge or a panel of a court of appeals. Hohn v. United States, 118 S. Ct. 1969, 1978 (1998).

The Court of Appeals for the Ninth Circuit of California denied petitioner's request for a Certificate of Appealability by Order filed March 30, 2001. (See Appendix A.)

The United States District Court for Central District of California's Order denying the

petitioner's Request for a Certificate of Appealability was filed January 4, 2001.

Petitioner files the instant petition within ninety (90) days from the filing date of the Ninth Circuit's Order of denial of the request for a Certificate of Appealability and this petition is therefore within the jurisdictional time limit imposed under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case primarily involves statute 28 U.S.C. § 2253 controlling the issuance of a Certificate of Appealability, specifically section (c)(2) which states that "a certificate of appealability" may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right."

This petition for a writ of certiorari also implicates 28 U.S.C. § 2254(e)(1), controlling an application for a writ of habeas corpus, which states that on federal habeas review, "a determination of a factual issue made by a State court shall be presumed to be correct," unless rebutted by clear and convincing evidence.

STATEMENT OF THE CASE

This is a petition from the Order of the United States Court of Appeals for the Ninth Circuit having jurisdiction pursuant to 28 U.S.C.A. § 2253 (West Supp. 1998). In the Order dated March 30, 2001, the United States Court of Appeals for the Ninth Circuit denied petitioner's request for a Certificate of Appealability from the judgment of the United States District Court for the Central District of California.

The Central District Court adopted the Report and Recommendation of the Magistrate Judge as its own findings pursuant to 28 U.S.C. § 636 and denied petitioner's federal petition for writ of habeas corpus on the merits of each claim and dismissed the petition with prejudice.

STATEMENT OF FACTS

The respondent does not dispute the statement of facts as described in the Report and Recommendation of Magistrate Judge Zarefsky as adopted by the United States District Court for the Central District of California.

The convictions in this case arose from two separate incidents which both took place on June 8, 1994 in Burbank, California. The first incident involved the petitioner's robbery of a restaurant at approximately 12:30p.m. By written note, the petitioner demanded that a restaurant employee

serving him "[p]ut all the 20's in the bag. I got a 357 gun." After seeing the petitioner move his shirt a little "away from his waist," indicating to the employee the possible presence of a gun in the petitioner's waistband, the employee placed the money in the petitioner's bag and then complied with his repeated requests to go to the back of the restaurant. The employee testified later that he did not smell any alcohol on the petitioner's breath. The employee thereafter called the police.

The second incident involved the petitioner's burglary of the residence of Coletta Trainor, the mother of a female acquaintance of the petitioner. Trainor had returned to her residence at approximately 2:15p.m., and noticed a yellow Mercedes parked in her driveway very close to her home's rear entrance. From the exterior of her residence, Trainor then observed the petitioner, whom she recognized, walking through the front room of her home and out the side gate of her yard. The petitioner told Trainor that he was there looking for her daughter. Trainor informed him that her daughter no longer lived at the residence. The petitioner then left a note and telephone number with Trainor to give to her daughter. Trainor did not believe that the petitioner appeared to be intoxicated at the time that he wrote note. Trainor added his full name on the note, along with his license plate number because she "was surprised to see him driving a Mercedes. I just thought I better keep check of the license number." The petitioner left in the Mercedes,

running over Trainor's brick planter as he drove away.

After the petitioner left, Trainor saw that the back screen door to her residence had been pulled off its runner, and also saw a large grocery bag by the back door containing clothing and money from her son's bedroom. She then determined that a number of other items were missing from the residence, reported the incident to police and gave an investigating officer the name and license plate number that she had written down, and advised the officer also that the petitioner's vehicle had been in a collision on her property. Investigating police located Petitioner at the home of the vehicle's registered owner, where Petitioner made incriminating statement and provided damning physical evidence to police relating to the burglary, and police discovered other evidence at the home which also implicated Petitioner in the restaurant's robbery.

The State of California charged Petitioner with burglary and robbery. The petitioner testified at trial, and admitted that he took all the property in question. Based on his own testimony and that of a defense expert (a psychiatrist and neurologist), Petitioner lacked the specific intent to commit either the burglary or robbery due to his alleged mental illness, cognitive impairment, and intoxication by alcohol and cocaine at the time he committed the crimes.

REASONS FOR REVERSING THE LOWER COURTS

I. PETITIONER MADE A SUBSTANTIAL SHOWING THAT THE DISTRICT COURT ERRED IN FINDING THAT PETITIONER PRESENTED NO CLAIM PURSUANT TO *MIRANDA V. ARIZONA.*

Petitioner asserts he made a substantial showing that the actions of the investigating officer in obtaining the evidence against petitioner and the prosecution's introduction of such evidence violated petitioner's rights under Miranda v. Arizona, such that petitioner is entitled to review by the Court of Appeal on the merits of his claims. As petitioner submitted to the Central District Court, the evidence was unlawfully obtained in the course of the Officer's interrogation of petitioner and should have been suppressed at trial.

Petitioner concedes it is well settled that Miranda applies only when there is custodial interrogation and while 'custody' does not require formal arrest, it does require 'the functional equivalent of formal arrest.' Miranda v. Arizona, 384 U.S. 436, 444 (1966). Furthermore, "the ultimate inquiry is simply whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." California v. Beheler, 463 U.S. 1121, 1125 (1983)(per curiam).

An officer's views "may bear upon the assessment of whether that individual was in custody *but only if* the officer's views or beliefs were somehow manifested to the individual under interrogation *and* would have affected how a reasonable person in that position would perceive his or her freedom to leave." Stansbury v. California, 511 U.S. 318, 325 (1994) (per curiam).

It is clear in this case that a reasonable person would have believed himself to be in sufficient custody to trigger the Miranda protection. Petitioner must be deemed to have and did in fact have such belief when a uniformed officer conducted questioning specific to the petitioner and when the officer made clear his investigation was not actually in regard to the purported traffic accident. Stansbury, 511 U.S. at 322.

Here, the officer in fact possessed suspicion that petitioner was the suspect in the burglary due to the identification of the homeowner witness. The officer proceeded to the home in which the petitioner was temporarily residing based on that suspicion. By such action, the officer's suspicion must be considered to have been manifested to petitioner. Petitioner would have no reasonable understanding that he was free to leave without answering questions. The Officer formulated a significant, in fact, a heightened suspicion that petitioner was the suspect in the burglary and therefore asked petitioner if he knew why the officer was really there at the residence to question

petitioner. No other conclusion is reasonable than that by such statement the officer informed petitioner his suspicion of him went beyond the purported traffic accident. As a result of the officer's questioning, petitioner provided incriminating statements leading to the production of physical evidence. As this physical evidence was obtained through the process of this impermissible interrogation of the petitioner, such evidence should have been suppressed.

The Central District Court adopted the Magistrate's retreat to a finding of harmlessness under Arizona v. Fulminante, 499 U.S. 279, 308-310, however the fact that petitioner admitted the same participation at trial has no relevance to the "prejudice" inquiry. The analysis must consider what may have been the realistic outcome had the evidence been suppressed. Had petitioner's statements and related evidence been suppressed, it is highly likely defense counsel would not have elicited these incriminating statements from petitioner at trial. It is highly likely that the admission of this same participation at trial was only to soften the impact or mitigate the use of the incriminating admission and evidence by the prosecution against petitioner.

II. PETITIONER MADE A SUBSTANTIAL FINDING THAT THE TRIAL COURT'S EXCLUSION OF THE EXPERT WITNESS VIOLATED PETITIONER'S RIGHT TO DUE PROCESS.

Petitioner asserts the trial court's exclusion of the expert witness on the issue of petitioner's lack of specific intent was in violation of due process.

The burden is on petitioner to establish that the trial court's actions regarding the exclusion of the expert's testimony rendered the proceedings fundamentally unfair. See Estelle v. McGuire, 502 U.S. 62, 72 (1991); Cupp v. Naughten, 414 U.S. 141, 146-147 (1973). To state a due process claim, the petitioner must show the trial court's decision violated the constitution and rendered proceedings fundamentally unfair". Dickerson v. Guste, 932 F.2d 1142, 1145 (5th Cir.).

Here, the expert was generally and hypothetically questioned on the issue of mental state. The District Court relied on this fact and determined that such questioning allowed the jury to formulate a sufficient link to the facts in petitioner's case to provide any available persuasive effect from the expert's testimony. To the contrary, only upon the expert's specific discussion of petitioner's mental state as it related to his defense of diminished capacity could the testimony carry enough weight to potentially persuade the jury. As such, the exclusion of the testimony of a key witness to the defense theory was a violation of due process and resulted in a miscarriage of justice of a constitutional magnitude.

Petitioner made a substantial showing of this fact in his request for a certificate of appealability such that he was entitled to appellate review on the merits of this claim. Therefore the Court of Appeal for the Ninth Circuit erred in denying petitioner's request.

III. PETITIONER MADE A SUBSTANTIAL SHOWING THAT HIS SENTENCE UNDER THE 'THREE STRIKES LAW' VIOLATED HIS CONSTITUTIONAL RIGHTS.

Petitioner made a substantial showing in his request for a certificate of appealability that his sentencing under the "three strikes" law violated his constitutional rights. Petitioner had further made a substantial showing of this sentencing error in his request before the Central District and fully articulated the basis for this claim in his Petition and attendant briefs before the Central District Court.

Furthermore, a misapplication of state sentencing law may result in a due process violation. Richmond v. Lewis, 506 U.S. 40, 50 (1992). Where state law misapplication rises to the level of constitutional magnitude, federal constitutional due process rights are implicated and the federal courts may take up review to provide a petitioner the appropriate relief.

Here, petitioner made a substantial showing that the trial court misapplied California's "three strikes" law and where affirmed by the California

Courts, such misapplication rose to the level of violating petitioner's due process rights. Where petitioner made a substantial showing of this claim, he was entitled to the granting of his request for a certificate of appealability on this issue before the United States Court of Appeal for the Ninth Circuit.

IV. PETITIONER MADE A SUBSTANTIAL SHOWING THAT THE THREE STRIKES LAW AS APPLIED IN HIS CASE IS UNCONSTIUTITONALLY VAGUE AND PETITIONER'S SENTENCE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

Petitioner made a substantial showing that the "Three Strikes law" as applied in his case is unconstitutionally vague and furthermore that petitioner's sentence constitutes cruel and unusual punishment.

Petitioner's Petition for Writ of Habeas Corpus and Traverse to the Respondent's Answer fully detailed the factual and legal basis upon which petitioner asserts the District Court's conclusions were erroneous. Petitioner further demonstrated this basis in his request for a certificate of appealability before the Central District and Court of Appeal for the Ninth Circuit.

The Eighth Amendment's proportionality analysis considers three aspects in light of a sentence: the gravity of the offense versus the harshness of the penalty; the sentences imposed on

other criminals in the same jurisdiction, especially for more serious crimes; and the sentences imposed for the same type of crime in other jurisdictions. Solem v. Helm (1983) 463 U.S. 277 at p. 292. Yet, in Harmelin v. Michigan (1991) 501 U.S. 957, no majority opinion was issued and the ability to challenge non-capital punishments on cruel and unusual Constitutional grounds was called into question due to lack of objective standards. Three Justices concluded that the Eighth Amendment prohibits as unconstitutional only those punishments that are "grossly disproportionate" to the crime committed. (Id. At p. 1001 [Opn. of Kennedy, J.]) The United States Supreme Court held that recidivist felon statutes may constitutionally impose long sentences for relatively minor subsequent offenses, based on the notion that recidivist felons pose a great danger to society. Rummel v. Estelle (9180) 445 U.S. 263 at p. 284. When a sentencing statute is more severe than similar measures in other jurisdictions, that alone is not enough for a showing of gross disproportionality from the crime, since each jurisdiction's legislature has punishing discretion, limited only by the State and Federal Constitutions. Id. at pp. 284-285; Harmelin v. Michigan, supra, 501 U.S. at p. 1005.

The Harmelin, supra, case should not be overemphasized however since it was not a majority opinion, and Solem v. Helm, supra, 463 U.S. at p. 289, already dealt with the issue of whether non-capital punishments can be

challenged by proportionality under the Eighth Amendment's prohibition against cruel and unusual punishment. The Court in Solem recalled that the Eighth Amendment specifically prohibited excessive fines and bails, and that the Court had previously held that the principle of proportionality does apply to hold certain capital punishments excessive under certain circumstances. Enmund v. Florida (1982) 458 U.S. 782.

The Court in Solem then stated that,

"It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not. There is also no historical support for such an exception. The common-law principle incorporated into the Eighth Amendment clearly applied to prison terms."

In Hutto v. Finney (1978) 437 U.S. 678 at p.685, incarceration was subject to scrutiny under the Eighth Amendment standards of gross disproportionality to the underlying crime and offender and where disproportionate was cruel and unusual punishment. This case is analogous to the Hutto case in that it is cruel and unusual punishment to incarcerate the petitioner for no less than 20 years until his first possible parole hearing, where pre-calculated murder with a deadly weapon would allow a possibility of parole after only 17 years and four months. In re Oluwa (1989) 207

Cal.App.3d 349 at pp. 444-447. Here, the petitioner's recidivism is being treated more harshly than a first-degree murder; even though according to Harmelin, supra, the capital case is treated specially and objective standards had not been prescribed. The current sentencing of this petitioner whose most recent conviction for burglary should have been charged as a petty theft due to Petitioner's status as an invitee in the victim's home and whose trend in criminal culpability is diminishing in severity is grossly disproportionate to the 65 years to life in prison he will suffer. The objective standard to which analysis should turn would suggest that non-violent criminals should be punished less severely than an equivalent violent criminal. To allow treatment juxtaposed to this premise is grossly disproportionate to the crime. When considering the facts of the petitioner's culpability, it is not reasonable to imprison him for a period longer than a murderer would be sentenced. Furthermore, analysis under the California State constitution for protection against cruel or unusual punishment should also weigh the cumulative disproportionality of the application of this mandatory sentencing law to this particular petitioner.

On this basis, petitioner made a substantial showing that his sentence as imposed under the "three strikes" law was unconstitutional as cruel and unusual punishment. As such, the United States Court of Appeal for the Ninth Circuit was in

error in denying petitioner's request for a certificate of appealability and should have certified this claim for review on the merits.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the Order of the United States Court of Appeals for the Ninth Circuit denying the petitioner's Request for a Certificate of Appealability on the claims raised on Petition for Writ of Habeas Corpus before the United States District Court and in this Petition for Writ of Certiorari before this Highest Court.

Dated: June 27, 2001

By: Richard Dangler

RICHARD DANGLER
Counsel of Record

FILED
MARCH 30 2001
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ADAM CARTER,	)	No. 01-55130
	)	
Petitioner-Appellant,	)	D.C.#. CV-98-
	)	00629-NMM
	)	Central California
v.	)	(Los Angeles)
	)	
ANA M. RAMIREZ-PALMER, WARDEN,	)	ORDER
	)	
	)	
Respondents-Appellee.	)	
	)	

Before: WALLACE and SILVERMAN, Circuit Judges

Appellant's request for a certificate of appealability is denied. *See* 28 U.S.C. § 2253(c)(2); Fed. R. App. P. 4(a).

LODGED October 6, 2000
Clerk, U.S. District Court
Central District of California
By Deputy Clerk

FILED November 1, 2000

ENTERED November 1, 2000

X Priority
X Send
_ Clsd
X Enter
X JS-5/(JS-6)
_ Js-2/JS-3

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TODD ADAM CARTER,	) Case No.: CV 98-06
	) 29-NM (RZ)
Petitioner,	)
	)
vs.	)
	) JUDGMENT
ANA RAMIREZ-PALMER, Warden, et al.,	)
	)
Respondent.	)
	)

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

This matter came before the Court on the Petition of TODD ADAM CARTER for a writ of habeas corpus. Having reviewed the Petition and supporting papers, and having accepted the Report and Recommendation of the United States Magistrate Judge,

IT IS ORDERED AND ADJUDGED that the Petition is denied and the action is dismissed with prejudice.

DATED: October 31, 2000 [by hand script]

"s/Nora M. Manella"
NORA M. MANELLA
UNITED STATE DISTRICT JUDGE

LODGED October 6, 2000
Clerk, U.S. District Court
Central District of California
By Deputy Clerk

FILED November 1, 2000

ENTERED November 1, 2000

_ X Priority
X Send
_ Clsd
X Enter
_ JS-5/JS-6
_ Js-2/JS-3

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TODD ADAM CARTER,	) Case No.: CV 98-06
	) 29-NM (RZ)
Petitioner,	)
	) ORDER ACCEPTING
vs.	) REPORT AND
	) ADOPTING
ANA RAMIREZ-	) FINDINGS,
PALMER,	) CONCLUSIONS AND
Warden, et al.,	)RECOMMENDATIONS
	) OF UNITED STATES
Respondent.	) MAGISTRATE
_____	) JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, records on file, and the Report and Recommendation of United States Magistrate Judge, and has considered de novo any portions of the Report as to which objections have been filed. The Court accepts the Magistrate Judge's Report and adopts it as its own findings and conclusions.

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

DATED: October 31, 2000 [by hand script]

"s/Nora M. Manella"
NORA M. MANELLA
UNITED STATE DISTRICT JUDGE

FILED October 6, 2000
Clerk, U.S. District Court
Central District of California
By Deputy Clerk

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TODD ADAM CARTER,	) Case No.: CV 98-06
	) 29-NM (RZ)
Petitioner,	)
	)
vs.	)
	)REPORT AND
ANA RAMIREZ-	)RECOMMENDATION
PALMER,	)OF A UNITED STATES
Warden, et al.,	) MAGISTRATE
	) JUDGE
Respondent.	)
	)

Pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California, the undersigned submits this Report and Recommendation to the Honorable Nora M. Manella, United States District Judge. The undersigned recommends that the Petition for Writ of Habeas Corpus by a Person in State Custody be denied and that this action be dismissed with prejudice.

A. Facts of the Underlying Offenses

On federal habeas review, "a determination of a factual issue made by a State court shall be presumed to be correct, "unless rebutted by the petitioner by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Here, the California Court of Appeal made substantial factual findings in affirming the conviction of the petitioner, Todd Adam Carter. (Answer, Ex. A.) As these findings (cited below and throughout this Report) were not rebutted by the petitioner by clear and convincing evidence, this Court presumes them to be correct. In addition, this Court independently has reviewed the relevant portions of the record.

The convictions in this case arose from two separate incidents which both took place on June 8, 1994 in Burbank, California. (*Id.* at A27; Respondent's August 8, 1999 Lodgment of Documents, Clerk's Transcript ("CT") 26, 1 Reporter's Transcript ("R.T.") 113-14, 131.) The

first incident involved the petitioner's robbery of a restaurant at approximately 12:30p.m. (Answer, Exh. A at A27.) By written note, the petitioner demanded that a restaurant employee serving him "[p]ut all the 20's in the bag. I got a 357 gun." (*Id.*) After seeing the petitioner move his shirt a little "away from his waist," indicating to the employee the possible presence of a gun in the petitioner's waistband, the employee placed the money in the petitioner's bag and then complied with his repeated requests to go to the back of the restaurant. (*Id.*; 1 R.T. 119-24.) The employee testified later that he did not smell any alcohol on the petitioner's breath. (Answer, Exh. 1 at A27; 1 R.T. 124.) The employee thereafter called the police. (Answer, Exh. A at A27.)

The second incident involved the petitioner's burglary of the residence of Coletta Trainor, the mother of a female acquaintance of the petitioner. (*Id.)* Trainor had returned to her residence at approximately 2:15p.m., and noticed a yellow Mercedes parked in her driveway very close to her home's rear entrance. (*Id.*; 1 R.T. 133.) From the exterior of her residence, Trainor then observed the petitioner, whom she recognized, walking through the front room of her home and out the side gate of her yard. (Answer, Exh. A at A27-A28.) The petitioner told Trainor that he was there looking for her daughter. (*Id.* at A28.) Trainor informed him that her daughter no longer lived at the residence. (*Id.*) The petitioner then left a note and telephone number with Trainor to give to her daughter. (*Id.*; 1

R.T. 137-38.) Trainor did not believe that the petitioner appeared to be intoxicated at the time that he wrote note. (Answer, Exh. A at A28.) Trainor added his full name on the note, along with his license plate number because she "was surprised to see him driving a Mercedes. I just thought I better keep check of the license number." (Id., 1 R.T. 139-40.) The petitioner left in the Mercedes, running over Trainor's brick planter as he drove away. (Answer, Exh. A at A28.)

After the petitioner left, Trainor saw that the back screen door to her residence had been pulled off its runner, and also saw a large grocery bag by the back door containing clothing and money from her son's bedroom. (id. at A28-A29.) She then determined that a number of other items were missing from the residence, reported the incident to police and gave an investigating officer the name and license plate number that she had written down, and advised the officer also that the petitioner's vehicle had been in a collision on her property. (*Id.*) Investigating police located Petitioner at the home of the vehicle's registered owner, where Petitioner made incriminating statement and provided damning physical evidence to police relating to the burglary, and police discovered other evidence at the home which also implicated Petitioner in the restaurant's robbery. (*Id.* at A29.)

The State of California charged Petitioner with burglary and robbery. (C.T. 25-26.) The petitioner testified at trial, and admitted that he took all the property in question. (*Id.* at A30, A33.)

Based on his own testimony and that of a defense expert (a psychiatrist and neurologist), Petitioner contended that he lacked the specific intent to commit either the burglary or robbery due to his alleged mental illness, cognitive impairment, and intoxication by alcohol and cocaine at the time he committed the crimes. (*Id.* at A30-A31, A33.)

B. State Court Proceedings

An information charged Petitioner not only with second degree robbery(Count One, Cal. Penal Code § 211) and first degree residential burglary of the (Count Two, Cal. Penal Code § 459) (C.T. 25-26), but also that the petitioner had suffered three prior felony convictions for burglary within the meaning of California Penal Code sections 667(a)(1) and 667(b)-(i) (the "three strikes" law). (C.T. 25-27.) On December 5, 1995, a jury sitting in Los Angeles County Superior Court convicted the petitioner of the robbery and burglary counts and also found true all the enhancement allegations. (Answer, Exh. A at A27; C.T. 195-197.) In a bifurcated trial, the jury further determined that the petitioner was sane at the time that he committed the two present offenses. (Answer, Exh. A at A27; C.T. 201-03.) The trial court sentenced the petitioner to a total term of sixty-four years to life in state prison, consisting of twenty-five years to life as the base term in Count One and a consecutive term of twenty-five years to life on Count Two imposed pursuant to the "three strikes" law, three five-year

enhancements for each of the three prior burglary convictions (totaling fifteen years), and a one-year reduction of sentence for the performance of a heroic act pursuant to California Penal Code section 2935. Answer, EXH. A AT A27; CT 232.

On July 31, 1997, the California Court of Appeal affirmed the judgment in a thirteen-page unpublished opinion. (Answer, Exh. A at A27, A38.) On November 12, 1997, the California Supreme Court denied the petitioner's petition for review without comment or citation to authority. (*Id.* at Exh. C at C91.) The petitioner did not seek state collateral review of his convictions.

II.

A. Federal Court Proceedings and the Petitioner's Claims.

The petitioner filed the present Petition pursuant to 28 U.S.C. § 2254, and raised the following claims for relief.

Claim One: He was interrogated by investigating police in violation of *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). (Petition at 6 and attachment.)

Claim Two: The trial court violated his right to due process when it excluded expert testimony regarding the petitioner's ability to form the specific intent to commit the crimes. (*Id.* at 6-7.)

Claim Three: In violation of "several constitutional right," the trial court improperly imposed two maximum consecutive sentences for

his robbery and burglary convictions under California 'three strikes' law, which "does not make consecutive sentencing mandatory nor does it authorize such sentencing. (*Id.* at 7.)

Claim Four: The "three strikes" law "is unconstitutionally vague, and fails to give adequate notice of the punishment to be imposed." (*Id. at &.)*

Claim Five: His total "sentence of 64 years to life is cruel and unusual punishment." (*Id.* at attachment.)

B. Standard of Review

The federal habeas statute prescribes the degree of deference that must be accorded to state court decisions which previously addressed pending habeas claims, providing as follows:

> An application for a writ of habeas corpus on behalf of a person in state custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts

in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

A state court decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme)Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 120 S.Ct. 1479, 1519-20 (2000). A state court decision involves an "unreasonable application" of clearly established federal law if the state court identifies the correct governing legal principle from Supreme Court precedent, but unreasonably applies that principle to the facts of the case. *Id.* at 1520.

The "unreasonable application" clause requires a showing that the state's decision was "objectively unreasonable," The federal court must reach a "firm conviction" that the state court's application of federal law was incorrect and that "clear error" has occurred. *Van Tran v. Lindsey*, 212 F.3d 1143, 1153-54 (9th Cir. 2000), petition for cert filed, 69 U.S.L.W. 3156 (U.S. Aug. I 1, 2000) (No. 00-255).Thus, a federal habeas court may not conclude merely that the petitioner has the better of two reasonable legal arguments. Id. The court must be left with a firm conviction that one answer, the one rejected by the state court, was correct and the other, the application of federal law that the state court adopted, was erroneous. *Id.*

Additionally, on habeas review, "a federal court is bound by the state court's interpretations of state law," and, as noted above, must presume also that the state court's determination of a factual issue is correct, unless rebutted by the petitioner by clear and convincing evidence. *Bains v. Cambra*, 204 F.3d 964, 972 (9th Cir. 2000); 28 U.S.C. § 2254(e)(1).

C. Application of Standard of Review to Present Proceedings

By its own terms, the key to triggering the standard of review articulated in 28 U.S.C. § 2254(d) is a previous "adjudicat[ion] on the merits in State court proceedings." The California Supreme Court denied the petition for review (wherein he presented the constitutional contentions set forth in the present Petition) without comment or citation to authority. (Answer, Exh. C at C91.) 1 The California Supreme Court's summary denial is considered to be a denial "on the merits." *Hunter v. Aispuro*, 982 F.2d 344, 348 (9th Cir. 1992), cert. denied, 510 U.S. 887 (1993). However, although this Court can consider the petitioner's claims "on the merits," *Kim v. Villalobos*, 799 F-2d 131 7, 1321 (9th Cir. 1 986), the Supreme Court decision cannot serve as the source of review. Rather, federal courts must "look through" a summary denial to previous state court decisions. See *Ylst v Nunnemaker*, 501 U.S. 797, 805-06 (1991). The prior ruling of the

Court of Appeal was accompanied by a written opinion, which expressly rejected the petitioner's claims on their merits. Therefore, the Court must apply the Ylst presumption and "look through" the Supreme Court's silent denial to the opinion of the Court of Appeal.

D. The Petitioner Presents No Claim Pursuant to Miranda v. Arizona.

In his first claim, the petitioner contends that he was interrogated by investigating police in violation of *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

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1 The respondent has argued that the petitioner did not exhaust his third claim regarding the constitutionality of his consecutive "three strikes" sentences In the California Supreme Court, presenting only a state law sentencing claim to that court. (Answer at 18, n. I 0.) Both the petitioner's petition for review and his appellate brief contended that the trial Court could not impose the consecutive sentences because they were not "authorized' by law. (Id. at Exh. B at B58; Petitioner's March 29, 1999 Lodgement at Exh. A at 27.) Broadly read, this language states a due process claim, as a state court may not constitutionally sentence a defendant to a sentence not "authorized" by law. *Marzano v. Kinncheloe*, 915 F.2d 549, 552 (9th Cir. 1990). Accordingly, this Court finds that the claim has been adequately presented to the state courts and will review it herein, as set forth below.

(Petition at 6 and attachment.) Here, the petitioner apparently contends, as he did in the state courts, that the evidence obtained as a result of the allegedly wrongful search should not have been admitted at

trial. (Answer, Exh. A at A3 I -A33, Exh. B at B52-853.) The petitioner's contention has no merit.

1. Background

At the residence where the petitioner was staying, a police officer, who didnot have his gun drawn, advised the petitioner that he was investigating a traffic accident at another residence, and that the victim had told the officer that she knew the petitioner and had identified him as the person who was involved in the accident.(Answer, Exh. A at A29.) The petitioner told the officer that he had been at the Trainor residence because he needed some clothes to wear. (*Id.*) According to the officer, the petitioner at that time became "'a very, very good suspect'" in the burglary because of the abandoned bag of clothing discovered by the back door of the Trainor residence, where someone had entered and ransacked the house. (*Id.*) The officer then asked the petitioner, "Do you know why I am really here?" (*Id.*) The petitioner replied, 'I will show you where everything is." (*Id.*) After the petitioner made this statement, the officer handcuffed him. (*Id.*)

The petitioner then took the officer to the bedroom where he had been staying, and pointed out jewelry, two-dollar bills, and nickels, all items that the officer believed to be items identified as missing from the Trainor residence. (*Id.*) The petitioner was then transported to jail for booking, where he was read his *Miranda* rights. (*Id.*, 3 R.T. 379-82.) Thereafter, the homeowner gave investigating officers permission to search the rest of the

residence and her vehicle. (Answer, Exh. A at A29.) During a further search of the petitioner's bedroom, the officers found more jewelry and a fanny pack full of money. (*Id*) One of the officers at the scene recalled the earlier robbery at the restaurant, and believed that the petitioner matched the description of the perpetrator. (*Id.*) It was determined subsequently that the amount of money in the pack was the same amount as that taken in the robbery. (*Id.*)

In the trial court and on direct review in the appellate courts, the petitioner contended that evidence of his spontaneous statement "I will show you where everything is," and related physical evidence, in response to the officer's question "Do you know why I am really here?" should have been suppressed, because he was in custody at that time, and should have been advised of his Miranda rights before being subjected to a "custodial interrogation." (Answer, Exh. A at A31, Exh. B at B54-855.)

When presented with the contention, the Court of Appeal concluded that"[t]he trial court properly ruled there was no 'in-custody interrogation'" within the meaning of Miranda and, accordingly, no basis to suppress the statement or physical evidence. (Answer, Exh. A at A31, A33.) The Court of Appeal stated that "it is well settled that Miranda applies only when there is a 'custodial interrogation,' and while 'custody' does not require formal arrest, it does require 'the functional equivalent of formal arrest." (*Id.* at A31 -A32, citations omitted.)

> In the present case, [the petitioner] had not been formally arrested at the time of his statement and was questioned in the familiar and non-threatening environment of the home in which he was staying. The investigation certainly focused on[the petitioner), as the [investigating] officer acknowledged[that the petitioner] was 'a very, very good suspect" because[the petitioner] had spontaneously indicated he was "there" at the scene of the traffic accident because he needed some clothes, and the officer had observed a bag of-clothing by the back door of the burglarized residence. Nonetheless, "the mere fact a defendant is a suspect does not establish custodial interrogation." Moreover, the general investigative questioning at issue ("Do you know why I am really here?")was brief [and] did not mention any specifics relating to the burglary .... Nor was there any objective indicia of Arrest, as the officers had not drawn their guns or at that time handcuffed (the petitioner). Accordingly, substantial evidence supports the trial court's conclusion that the questioning complained of did not constitute in-custody interrogation within the meaning of Miranda.

(Answer, Exh. A at A32-A33.) The appellate court noted further that, even if admission of the contested evidence could "somehow" be considered error, it

would be harmless beyond a reasonable doubt pursuant to *Arizona v. Fulminante*, 499 U.S. 279, 308-10 (1991), given that the petitioner "at trial admitted taking the property, and his [challenged] statement did not relate to his defense of lack [of] capacity to form [the] specific intent" to commit the crimes. (*Id.* at A33.) The appellate court's conclusions comport with relevant federal law.

2. The Petitioner Identifies No Action by the Investigating Officers Which Violated Miranda

Miranda bars the prosecution from using statements or physical evidence obtained as a result of custodial interrogation unless the defendant was first apprised of his constitutional rights, including his Fifth Amendment right to remain silent. See *Miranda*, 384 U.S. at 444; *Stansbury v. California*, 511 U.S. 31 8, 322 (1994) (per curiam). *Miranda's* safeguards apply only when law enforcement officials initiate questioning after a person has been taken into custody or otherwise deprived him of his freedom of action in any significant way. *See Id.*

While "custody" does not require formal arrest, it does require "the functional equivalent of formal arrest." *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984). "In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but 'the ultimate inquiry is simply whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.'"

Stansbury, 511 U.S. at 322, *quoting California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam).

Here, as the Court of Appeal found, and the petitioner does not contest, the petitioner had not been formally arrested at the time that he made the challenged statement, had not been physically restrained *prior* to making it, and the investigating officer had not drawn his weapon. (Answer, Exh. A at A32.) That the officer had initiated a *discussion* with the petitioner at the residence regarding the traffic incident also does not establish custody; even when police initiate questioning regarding a specific charge *and* that questioning takes place in the more formal environment of the police station, a person still may not be in custody. *Beheler*, 463 U.S. at 1125. *See also Pennsylvania v. Muniz*, 496 U.S. 582, 600-02 (1990) (a defendant's Fifth Amendment rights are not invoked by questions "normally attendant to arrest and custody" on a specific charge).

That the petitioner's subsequent statement regarding why he was at the Trainor residence made him "a very, very good suspect"' in the burglary prior to the officer's challenged question and the petitioner's challenged "response" also does not establish that the petitioner was then "in custody" for purposes of Miranda. An officer's views "may… bear upon the assessment whether that individual was in custody, *but only if* the officer's views or beliefs were somehow manifested to the individual under interrogation *and* would have affected how a reasonable person in that position would perceive

his or her freedom to leave." Stansbury, 511 U.S. at 325 (emphasis added). As the Court of Appeal pointed out, the "questioning" at issue ("Do you know why I am really here?") "was brief [and] did not mention any specifics relating to the burglary." (Answer, Exh. A at A32.) The questioning did not convey the officer's views that the petitioner was a suspect in the burglary, and did not imply that the petitioner was not free to terminate any further "questioning" by the officer. (Nor did the earlier discussion regarding the traffic incident indicate any views that the officer may have already had regarding the petitioner's status as a suspect in the burglary itself.) Thus, the "questioning" at issue did not constitute "custodial interrogation" within the meaning of *Miranda*. *Stansbury*, 511 U.S. at 325.

That the petitioner was handcuffed before he showed the police the burglarized property is also of no moment. The petitioner already had volunteered to show the property to the investigating officer *before* he was restrained, and was simply completing his earlier voluntary provision of information, not responding to any new question by the officer or other police on the scene. *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980) (Miranda warning given only when a person in custody is subjected by law enforcement officials to either express questioning or its functional equivalent as interrogation entails a "measure of compulsion above and beyond that inherent in custody itself").

Thus, as the officer's question did not amount to custodial interrogation, and the circumstances in which the petitioner made the challenged statement did not indicate the "functional equivalent of formal arrest," no Miranda violation occurred, and the trial court, therefore, was not required to suppress that statement and related physical evidence at trial. Id., Berkemer, 468 U.S. at 442. Moreover, because the petitioner admitted at trial that he had taken the property, and his challenged statement did not relate to his principal defense of lack of capacity to form the specific intent to commit the crimes, any error in admitting any of the challenged evidence was harmless, as it would not have had an effect on the jury's verdict. Brecht v. Abrahamson, 507 U.S. 619, 637 (1993); Fulminante, 499 U.S. at 295. Alternatively, the petitioner's subsequent admission at trial that he took the property renders moot and waives any Miranda claim here because that admission encompasses the very substance of the statement and related physical evidence that the petitioner challenges as improperly obtained. *See, e.g., Peretz v. United States*, 501 U.S. 923, 936 (1991) ('The most basic rights of criminal defendants are ... subject to waiver"); *United States v. Horodner*, 993 F.2d 191, 195 (9th Cir. 1993) (claim that attorney erred in failing to object to sentence was mooted by court's subsequent modification of sentence).

Accordingly, the petitioner's first claim should be dismissed with prejudice.

E. The Trial Court Took No Action, Which Violated the Petitioner's Due Process Rights Regarding Expert Testimony On Specific Intent

In his second claim, the petitioner contends that the trial court violated his right to due process when it excluded expert testimony regarding the petitioner's ability to form the specific intent to commit the crimes. (Petition at 6-7.) Specifically, the petitioner contends that while the trial court allowed a defense expert to testify that the petitioner's alleged intoxication had an effect on the petitioner's mental state on the date of the offenses, the court should not have excluded the expert's opinion that the petitioner did not form the specific intent required for burglary and robbery because of his alleged intoxication. (Id)

The Court of Appeal noted first that defense counsel had expressly conceded the issue prior to the trial court's ruling and did not object when the trial court later ruled that, pursuant to *People v. Rangel*, 11 Cal.App.4th 291 (1992), the expert could not tell the jury that the alleged intoxication affected the petitioner's capacity to form the requisite specific intent to commit either crime. (Answer, Exh. A at A33-A34.) The appellate court also noted that defense counsel did not ask the expert whether the petitioner had formed the requisite specific intent, indicating his apparent agreement with the trial court's ruling limiting the testimony under *Rangel*, (*Id.* at A34.) And, apart from counsel's concession of the issue at trial, the Court of

Appeal found that the trial court's application of Rangel to exclude the testimony on-specific intent was not in error. (*Id.)*

With respect to his due process claim, the petitioner must show that the trial court's actions regarding the exclusion of the expert's testimony rendered the proceedings fundamentally unfair. *See Estelle v. McGuire*, 502 U.S. 62, 72 (1991); *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973). The petitioner has identified no such action by the trial court. As the Court of Appeal held, under California law, defense counsel conceded and/or waived the issue, which had not been incorrectly decided by the trial court, in any event. (Answer, Exh. A at A34-A35) This ruling as to the effect and meaning of state law is binding on this Court. *Bains*, 204 F.3d 972. Thus, the petitioner does not show that the exclusion of the testimony amounted to constitutional error, as the trial court's actions were within state law. *See Jammal v.Van de Kamp*, 926 F.2d 918, 919 (9th Cir. 1991) ("adherence to state evidentiary rules.suggests that the trial was conducted in a procedurally fair manner"); *Estelle*, 502 U.S.at 72 (to state due process claim, petitioner must show how trial court's decision violated constitution and rendered proceedings fundamentally unfair); *Dickerson v. Guste*, 932 F.2d 1142, 1145 (5th Cir.) (no basis for federal habeas relief where petitioner failed to show that state court's denial of motion "constituted a violation of any constitutional right'), *cert. denied*, 502 U.S. 875 (1991). Moreover, as noted above, defense counsel

expressly conceded the issue at trial, and accepted the court's ruling, both as to its basis and its limitation (Answer, Exh. A at A33-A34), waiving a claim by the petitioner here regarding the exclusion of the testimony by the trial court. See, e.g., *Peretz*, 501 U.S. at 936.

Finally, even assuming error, the Court of Appeal concluded that "it would be harmless beyond a reasonable doubt" because of defense questioning of the expert on general issues of mental state, as well as other evidence in the case. (Answer, Exh. A at A34.) Specifically, the appellate court noted that defense counsel did ask the expert whether various factors, which paralleled evidence adduced at trial regarding the petitioner, would have any effect on "'that hypothetical person's mental state on the day in question,'" and that the expert had responded, "'Yes. Absolutely, yes.'" (*Id.*)

> The hypothetical question asked and answered [by the expert], as well as the extensive evidence presented regarding [the petitioner's) mental state at the time of the crimes, renders it unlikely that had [the expert] actually articulated the words that [the petitioner] did not have the requisite intent to commit robbery and burglary a more favorable verdict would have ensued.

(*Id.* at A34-A35.) Thus, the petitioner was not prejudiced by the exclusion of the testimony, which

was largely cumulative to what was already presented at trial. *See Brecht*, 507 U.S. at 637.

Accordingly, as the petitioner has identified no constitutional error by the trial court, or prejudice, the petitioner's second claim should be dismissed with prejudice.

F. The Petitioner Presents No Claim With Respect to His Consecutive Sentences Imposed Pursuant to the "Three Strikes" Law

In his third claim, the petitioner contends that, in violation of "several constitutional rights," the trial court improperly imposed two consecutive sentences of twenty-five years to life for his robbery and burglary convictions under California's" three strikes" law, which "does not make consecutive sentencing mandatory nor does it authorize such sentencing." (Petition at 7.)

Generally, matters relating to state sentencing are not cognizable on federal habeas review. *Miller v. Vasquez*, 868 F.2d 1116, 1118-1119 (9th Cir. 1989*),cert. denied*, 499 U.S. 963 (1991). See also *Watts v. Bonneville*, 879 F.2d 685, 687 (9th Cir. 1989) (contention that California court violated state sentencing provision was not subject to federal habeas review because federal habeas relief can be granted "only for violations of federal law"); *King v. White*, 839 F.Supp. 718, 729 (C.D. Cal. 1993) ("'Matters relating to sentencing and serving of a sentence are governed by State law and do not raise

a Federal constitutional question") (citations omitted).

However, under narrow circumstances, the misapplication of state sentencing law may result in a due process violation. See *Richmond v. Lewis*, 506 U.S.40, 50 (1992). Still, *no* constitutional claim is presented where the sentence imposed is within the limits allowed by state law. *See, eg., Whalen v. United States*, 445 U.S. 684, 689 n.4 (1980) (no federal due process violation where punishment is within range "authorized by state law"); *White v Keane*, 969 F.2d 1381, 1383 (2d Cir. 1992)("No federal constitutional issue is presented where . . . . a sentence is within the range prescribed by state law"); *Thomas v Senkowski*, 968 F.Supp. 953, 956 (S.D.N.Y.1997) ("it is well established that, when a sentence falls within the range prescribed by state law, the length of the sentence may not be raised as grounds for federal habeas relief").

Here, the California Court of Appeal found that the petitioner's contention that the trial court had improperly imposed two consecutive sentences in violation of the "three strikes" law to be "without merit." (Answer, Exh. B at B35.)

> [The petitioner] was properly sentenced to two consecutive 25 years-to-life terms under . . the three strikes law. Current multiple felonies for a defendant with a third strike, as in the present case with [the petitioner's] separate burglary, and robbery offenses,

> *require* mandatory consecutive sentences [under the three strikes law].

(*Id.*, emphasis added, citations omitted.) The Court of Appeal's ruling as to the effect and meaning of state law is binding on this Court. See *Wainwright v. Goode*, 464 U.S. 78, 84 (1983) (state court's interpretation of state law is binding on federal court); *Aponte v. Gomez*, 993 F.2d 705, 707 (9th Cir. 1993) (federal court is "bound by a state court's construction of its own penal statutes"). Thus, because the sentence was within the range authorized by state law, no federal constitutional claim is presented with respect to the petitioner's consecutive sentences under the "three strikes" law, and his third claim should be dismissed with prejudice.

G. The Petitioner's Contention that the "Three Strikes" Law is Unconstitutionally Vague Is Without Merit

In his fourth claim, the petitioner contends that the "three strikes" law "is unconstitutionally vague, and fails to give adequate notice of the punishment to be imposed." (Petition at 7.) When presented with the contention, the Court of Appeal held that the "three strikes" law was neither unconstitutionally vague, nor deprived the petitioner of "the due process right to fair notice . . . ." (Answer, Exh. A at A35-A36, citations omitted.) The appellate court's conclusion is not "contrary to"

or an "unreasonable application" of clearly established federal law on the subject. 28 U.S.C. § 2254(d).

A criminal statute is unconstitutionally vague when it "fails to give a person of ordinary intelligence fair notice that his conduct is forbidden." *United States v. Batchhelder*, 442 U.S. 114, 123 (1979) (citations omitted). See also *United States v. Johnson*, 130 F.3d 1352, 1354 (9th Cir. 1997); *United States v. Gallagher*, 99 F.3d 329, 334 (9th Cir. 1996), *cert denied*, 520 U.S. 1129 (1997). "So too, vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." *Batchelder,* 442 U.S. at 123,citations omitted.

To merit habeas relief, "a vagueness challenge may not rest on arguments that the law is vague in its hypothetical applications, but must show that the law is vague as applied to the facts of the case at hand." *Johnson*, 130 F.3d at 1354, *citing Chapman v. United States*, 500 U.S. 453, 467 (1991). See also Gallagher, 99 F.3d at334. The petitioner has not made such a showing, arguing only that the "three strikes" law "is not specific as to its application and allowed the court too many interpretations.... and as it is applied to me is unconstitutional." (Petition at 7.) Such conclusory allegations fail to state a vagueness claim. *Johnson,*, 130 F.3d at 1354.

In any event, the petitioner was on notice of the punishment he could receive under the statute's provisions, and the sentence that he actually

received conformed to the clear language of the statute. The jury made "true findings as to three poor burglaries each found to be. prior convictions for both 'three strikes' and five-year enhancement purposes." (Answer, Exh. A at A27; see also C.T. 194-97.) As a result, as the Court of Appeal held, the punishment faced by the petitioner as a "three strikes" defendant under the statute was as follows: "If a defendant has two or more prior felony convictions ... that have been pled and proved, the term for the current felony conviction shall be an indeterminate term of life imprisonment with minimum term of ... 25 years." CAL. PENAL CODE § 667(e)(2)(A)(ii). See also Answer, Exh. A at A35. And, because the petitioner was convicted of two separate felony counts in the current case, which were "not committed on the same occasion, and not arising from the same operative facts," the trial court was required to "sentence the defendant consecutively on each count pursuant to subdivision (e)." CAL. PENAL CODE § 667(c)(6). See also Answer, Exh. A at A35.

Consistent with the statute, the trial court imposed consecutive twenty-five years to life sentences on the separate robbery and burglary counts. (C.T. 232.) Accordingly, the sentence that the petitioner received in conformity with the "three strikes" law did not violate his constitutional rights on vagueness grounds, and his fourth claim should be dismissed with prejudice.

H. The Petitioner's Sentence Does Not Constitute Cruel and Unusual Punishment

In his fifth claim, the petitioner contends that his total "sentence of 64 years to life is cruel and unusual punishment." (Petition at attachment.) In support of this contention, the petitioner argues that the total sentence is unfair because it "relies on dual use of facts in its calculation and does not consider my mental illness, drug and alcohol use." (*Id.*) When presented with the contention, the California Court of Appeal held that

> Contrary to [the petitioner's] assertion, his sentence of 64 years to life, even in view of his mental illness and abuse of alcohol and cocaine, is not so grossly disproportionate to the severity of his crimes and the risk posed to society as to constitute cruel or unusual punishment within the meaning of the state or federal constitutions. (*Solem v. Helm* (1983) 463 U.S. 277, 290-300; *In re Lynch* (1972) 8 Cal.3d 410,425-429.)

(Answer, Exh. A at A37.)

The appellate court supported its conclusion by applying a three-pronged proportionality test, set forth in *Solem* and *Lynch*, the above-cited federal and state court decisions. (Id) "The three-pronged test set forth by the United States and California Supreme Courts requires . . . us to examine 'the nature of the offense and/or the offender, with

particular regard to the degree of danger both present to society,' to compare the penalty at issue with those imposed for more serious offenses, and to compare the challenged penalty with those for the same offense in other jurisdictions.' (*Id.*, citations omitted.) The appellate court noted some question regarding the necessity of applying such a test after the plurality opinion of *Harmelin v. Michigan*, 501 U.S. 957 (1991), but, "[e]ven assuming this test is appropriate in an Eighth Amendment analysis," application of the factors did not support a finding that the sentence resulted in cruel and/or unusual punishment. (*Id.*)

With respect to the first factor, the appellate court noted that, although the petitioner's prior burglary convictions were either property crimes or offenses relating to his use of alcohol or drugs and no one was physically harmed during the commission of the present crimes,

> the imposition of a lengthy sentence pursuant to a recidivist statute need not await a defendant's commission of the most violent or serious offenses. [The petitioner's] record of increasingly serious criminal behavior stretches throughout his entire adulthood, indicating prior attempts at rehabilitation and deterrence have failed. As to [the petitioner's] focus on his mental illness and substance abuse, the jury rejected this defense and the judge at sentencing was similarly unmoved. It is a factor to consider in [the petitioner's]

> present claim, but so is the factor of [the petitioner's] threat to public safety as a burglar and robber and his lack of rehabilitation.

(*Id.* at A37-A38.)

With respect to the second and third factors, the appellate court found that

> a comparison of inter- and intra-jurisdictional punishments does not compel a finding cruel and unusual punishment. Although [the petitioner] notes that the total sentence for his felony recidivism is greater than for first degree murder, [the petitioner's] sentence is not the product of an isolated situation . . . ; As to the comparative punishment in other states, [the petitioner] acknowledges that other states have some form of three strikes law with third strikes involving serious felonies, as in the present case. [¶] Accordingly, although [the petitioner's] recidivist sentence under the three strikes law is lengthy, it does not amount to unconstitutionally cruel or unusual punishment.

(Id at A38.) The appellate court's conclusion is neither "contrary to" or "an unreasonable application" of federal decisional law on the subject. 28 U.S.C.§ 2254(d).

"The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin*, 501 U.S. at 1001 (1991) (Kennedy, J., concurring).2 In a non-capital case, "successful challenges to the proportionality of particular sentences [will be] exceedingly rare.'" *Solem,* 463 U.S. at 289-90 (emphasis added in original), *quoting Rummel v. Estelle*, 445 U.S. 263, 272 (I 980). Generally, as long as the sentence imposed does not exceed statutory limits, it will not be overturned on Eighth Amendment grounds. Windham v. Merkle, 163 F.3d 1092, 1106(9th Cir. 1 998), United States v. Harris, 1 54 F.3d 1082, 1084 (9th Cir. 1 998), *cert.*

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2 With respect to the plurality opinion of Harmelin, the Ninth Circuit has "conclude[d] that Justice Kennedy's view that the eighth amendment 'forbids only extreme sentences that are "grossly disproportionate" to the crime' is the 'rule' of Harmelin." *United States v. Bland*, 961 F.2d 123, 129 (9th Cir.), cert. denied, 506 U.S. 858 (1992).

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denied, 120 S.Ct. 86, 310 (1999); United States v. Mejia -Mesa, 153 F.3d 925, 930 (9th Cir. 1998). This is so because "[r]eviewing courts. . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types of and limits of punishments for crimes." *Solem*, 463 U.S. at 290. See also Rummel, 445 U.S.

at 274 (acknowledging "reluctance to review legislatively mandated terms of imprisonment"); Harmelin, 501 U.S. at 998 (responsibility for making and implementing "fundamental choices" regarding severity of punishment "lies with the legislature").

Here, the Court of Appeal determined that the entire term of petitioner's sentence did not exceed statutory limits and was correctly imposed under California law. (Answer, Exh. A at A35-A36.) Accordingly, on the basis of the term of his legislatively-authorized sentence alone, the petitioner does not establish that his sentence constitutes cruel and unusual punishment under the Eighth Amendment. See, e.g., Rummel, 445 U.S. at 285 (holding that a sentence of life with possibility of parole imposed under a recidivist statute for present felony of uttering "no account" check for $100 and two prior felonies involving theft of less than $129 did not violate the Eighth Amendment); *Harris*, 154 F.3d at 1084 (holding that federal mandatory minimum sentences of ninety-five and fifty years for youthful armed bank robbery defendants with no prior record did not violate the Eighth Amendment).

Nor does the petitioner establish that his sentence was cruel and unusual punishment on any other basis. Although the petitioner focuses on his present burglary and robbery convictions and argues that a sixty-four year to life sentence on those crimes is grossly disproportionate, the petitioner's focus is misplaced. That is, as noted by the Court of Appeal,

the term of his imprisonment arises from his status as a recidivist under the three-strikes and enhancement laws used to calculate his total sentence, and was not imposed on his burglary and robbery convictions in isolation. (Answer, Exh. A at A37-A38.) "In judging the appropriateness of [defendant's) sentence under a recidivist statute, we may take into account the government's interest not only in punishing the offense of conviction, but also its interest in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by criminal law." *Bland*, 961 F.2d at 129. See, also Solem, 463 U.S. at 296 ("a State is justified in punishing a recidivist more severely than it punishes a first offender"). As the Court of Appeal noted, "although [the petitioner's] recidivist sentence under the three strikes law is lengthy, it does not amount to unconstitutionally cruel or unusual punishment." (Answer, Exh. A at A38.)

The petitioner's additional focus on his alleged mental illness and substance abuse is similarly unavailing. As the Court of Appeal noted, "the jury rejected this defense and the judge at sentencing was similarly unmoved. It is a factor to consider in [the petitioner's] present claim, but so is the factor of [the petitioner's]threat to public safety as a burglar and robber and his lack of rehabilitation." (Answer, Exh. A at A37-A38.)

Under relevant federal decisional law on the subject, the appellate court's conclusion that the

sentence was not 'grossly disproportionate" is supported by its separate finding that the total sentence did not exceed the relevant statutory limits and its focus on the petitioner's status as a recidivist with a "record of increasingly serious criminal behavior" who had not been rehabilitated and who posed "a threat to public safety as a burglar and robber." (Answer, Exh. A at A35-A38). See *Harmelin*, 501 U.S. at 1004 (even "one factor may be sufficient to determine the constitutionality of a particular sentence"). As the Court of Appeal's conclusion is neither "contrary to" or an "unreasonable application" of federal law, 28 U.S.C. § 2254(d), the petitioner's fifth claim should be dismissed with prejudice.

III.

For the foregoing reasons, IT IS RECOMMENDED that the District Court (1) issue an Order accepting and adopting this Report and Recommendation; and (2) enter judgment denying the Petition and dismissing the action with prejudice.

DATED: October 5, 2000 [by hand script]

"s/Ralph Zarefsky"
RALPH ZAREFSKY
UNITED STATE MAGISTRATE JUDGE